NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

BRIEF INTRODUCTORY STATEMENT

Since the filing of Appellants' Opening Brief herein, a Reply Brief has been filed by Appellee, United States of America, and additionally Appellants' Motion to Augment Record on Appeal was granted, and the documents requested therein have been furnished to this Honorable Court as a part of the record on appeal. In the instant Reply Brief, Appellants will address themselves only to those portions of the arguments raised by Appellee which Appellants believe require further clarification or discussion. Appellants submit that other arguments, if any, raised by Appellee are sufficiently

refuted by Appellants' Opening Brief and that further consideration of same herein would serve no useful purpose. Accordingly, Appellants will rely in this regard, upon the arguments and authorities mentioned in said initial Brief.

II

ARGUMENT

A. APPELLANTS DID NOT AND COULD NOT WAIVE THEIR CONSTITUTIONAL RIGHT TO RAISE THE ISSUE ON THIS APPEAL AS TO WHETHER THEY WERE PROPERLY REPRESENTED BY COUNSEL AT THEIR TRIAL, DUE TO THE CONFLICT IN INTEREST WHICH EXISTED BETWEEN APPELLANTS.

According to Appellee "Appellants were not deprived of the 'assistance of counsel' by their retention of the same attorney, despite a conflict in their respective interests". While the government does not necessarily acquiesce to the fact that such a conflict did exist, it does concede that the only person legally qualified in this action to whom the facts pertaining to such conflict were disclosed was the attorney for Appellants, Mr. Beckler. In this respect the record of Mr. Beckler's actions must, of course, speak for themselves. It is clear, however, from Mr. Beckler's statements to the court that at least in his mind there was a definite conflict. No facts or arguments are advanced by Appellee to show how the conflict propounded by Mr. Beckler on the date originally scheduled for trial was or could be resolved by the trial by court

herein. (It will be recalled that the conflict disclosed by Mr. Beckler to the court pertained to statements made by defendant Kaplan which were "extremely essential to Mr. Berumen's defense".) (See Rep. Tr. p. xii, lines 1-14).

In any event the government's main contention with regard to the conflict in interest which existed at the trial is that such conflict must now be deemed immaterial because, according to the government, Appellants waived their rights to raise such issue on this appeal. Appellee's position in this respect is that so long as an attorney in a criminal action informs his clients of a potential conflict there is no problem with his continuing to represent such clients, and that the judge, if he has any duty in this regard, need merely make a simple inquiry in open court as to whether the parties are aware of such a conflict.

While the position taken by the government is interesting, Appellants submit that such is not and cannot be the rule of law in dealing with this type of problem. Putting the problem in the instant case in its simplest terms, the real question involved is two fold -- i. e. (1) whether Appellants, after being informed by their attorney that a substantial conflict of interest in fact existed, can be deemed to have intelligently waived their right to now raise such conflict because this same attorney thereafter informed Appellants that this conflict would not cause a problem in a trial by court, even though the conflict involved statements made by one of the Appellants which were important to the defense of the other; and (2) what duty, if any, the trial judge owed to Appellants to

ascertain whether they in fact knew what they were doing when they relied upon Mr. Beckler's advice that he could continue to represent both of them at the trial in this matter, despite the conflict disclosed.

In connection with the problems raised in this case, it should be noted that the factual situation depicted would appear unique. Accordingly, none of the authorities cited by either Appellants or Appellee are factually directly in point. 1/

1/ For example, the cases upon which chief reliance is placed by the government in this area are Adams v. United States ex rel McCann, 317 U. S. 269, a case wherein the defendant represented himself in pro per at trial, but "had studied law, and was sufficiently familiar therewith to adequately defend himself, and was more familiar with the complicated facts of the case than any attorney could ever be" (at p. 270). The defendant in the Adams case had, in fact, previously brought and prosecuted appeals in civil actions all the way to the United States Supreme Court. Under such facts the Supreme Court concluded that the waiver of the right to counsel by the defendant was an intelligent, informed judgment on his part. The government also relies upon the case of Swope v. McDonald, 173 F. 2d 852 (9th Cir. 1949), wherein the court concluded that the defendants therein suffered no prejudice by having the same lawyer at trial, where under the version of the facts most favorable to defendants on appeal, it was disclosed that on the day of trial one of the defendants told his lawyer that he wanted other counsel to represent him on the ground that his present lawyer had failed to bring a habeas corpus proceeding to have defendants released from jail during the period of time between their arrest and their trial, even though said lawyer had informed defendants that he had been advised by the court that the trial date would be sooner than any date for a hearing on the habeas corpus proceeding. Under such circumstances there was not, of course, any conflict or improper representation. Appellee also purports to rely upon the case of United States v. Simone, 205 F. 2d 480 (2nd Cir. 1953), wherein on several occasions during the course of the trial one or more of the attorneys would be briefly absent from the courtroom and during this interim one of the remaining counsel would nominally represent the missing attorney's client. In the case no possible conflict or prejudice was or could conceivably be shown. The Court of Appeals, however, pointed out that the "defendants' failure themselves to object to the substitutions [of counsel] is not a waiver of their constitutional privilege to be represented by counsel of their own choice".

The rule of law, however, in dealing with the problems raised by this case is quite clear and is directly applicable to the factual issues presented. Despite Appellee's assertions, insofar as Appellants' actions are concerned in permitting Mr. Beckler to continue to represent both of them at trial, it is totally inconceivable that they could intelligently make such a decision without consultation of other counsel or of the court in lieu of Mr. Beckler's representations to them that there would be no conflict if he continued to represent them. It must be remembered in this regard that this is not an action wherein two or more parties represented by the same counsel are made aware of the conflict, but decide to continue with the same representation of counsel despite the conflict. Under the facts herein, Appellants relied upon Mr. Beckler's statements to them that the conflict had been resolved by virtue of the trial by court.

Insofar as the duties of the trial judge is concerned, Appellants submit that it was the obligation of the court, under the facts presented herein, to clearly establish that the conflict propounded by Mr. Beckler had been resolved. Admittedly, Judge Lindberg did ask the Appellants if they were satisfied to have Mr. Beckler continue to represent them, and upon Mr. Beckler's advice that there was no further conflict, Appellants, of course, agreed to such continued representation. Unquestionably, however, a greater duty was owed by Judge Lindberg. Appellee suggests that nothing more could have been done by Judge Lindberg to inquire into the potential conflict, since he was to be the trier of fact, and

accordingly, in effect, could not inquire further into the conflict without prejudicing himself (although he conceivably already had been prejudiced by virtue of his knowledge of the possible conflict). It is obvious that under such circumstances, Judge Lindberg had various simple alternatives. For example, he could have refused to consent to the waiver of a jury and inquired further into the potential conflict. He could have remanded the matter to the assigning trial court for further inquiry by that court or some other judge as to the nature of the conflict. He could have requested further information on the conflict himself, and thereafter, if satisfied that such a conflict did in fact exist and that the disclosure thereof to him might be prejudicial in his mind to the conduct of a fair trial, then disqualify himself from sitting as the trier of fact. In fact, however, nothing more was done by Judge Lindberg, and this failure to further inquire was, it is submitted, reversible error. Appellants believe that the holding of the Circuit Court in the case of Campbell v. United States, 352 F. 2d 359 (D. C. Cir. 1965), is particularly applicable to the facts of the instant case. In Campbell the District Court reversed the conviction of one of the defendants on the grounds that his defense was substantially prejudiced by sharing counsel with his co-defendant. The record in the case was silent as to whether the defendants were sufficiently aware of the importance of having separate counsel. The court concluded:

"When two or more defendants are represented by a single counsel, the District Court has the duty to

ascertain whether each defendant has an awareness of the potential risk of that course and nevertheless has knowingly chosen it.

"The Supreme Court has stressed the importance of having separate counsel representing co-defendants where their interests may not coincide. [citation]. In our opinion we have suggested that co-defendants are 'entitled to be represented by separate counsel . . . [if] there was some inconsistency in joint representations.' [citation]. We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. [citation]. And the Supreme Court has stated that the trial judge bears 'the duty of seeing that the trial is conducted with solitude for the essential rights of the accused,' specifically the right to effective assistance of counsel. [citation]. The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Consideration of effective judicial administration as

well as the important rights of defendants are served when the trial court makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney . . . . We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel. [citation]." (at pp. 360-361) (Emphasis added).

Examining the events which transpired in the instant action in terms of the holding in the Campbell case, there can be no question but that it must be presumed that Appellants' defense was prejudiced by their retention of Mr. Beckler, that they did not intelligently waive their right to question the assistance provided them by counsel, and that the trial judge did not properly ascertain whether defendants were exercising intelligent judgment in having joint representation at trial. Accordingly, Appellants' conviction must be reversed.

B. PREJUDICE SUFFERED BY APPELLANTS BY VIRTUE OF THE IMPROPER EXAMINATION BY THE TRIER OF FACT OF CERTAIN GOVERNMENT REPORTS HEREIN, WARRANTS REVERSAL OF APPELLANTS' CONVICTIONS.

Clearly, a fundamental concept of "due process of law" is that parties to controversies are entitled to have them determined by an impartial tribunal which is free from bias and prejudice.

Lee v. Fleming, 158 F. 2d 984, cert. den.
331 U. S. 805;
Baker v. Simmons Company, 342 F. 2d 991
(1st Cir. 1965).

In the instant case it is clear that the United States Treasury Secret Service Department report dated February 2, 1966, and the letter from the Treasury Department to Manuel L. Real, dated January 5, 1965, which documents, pursuant to Appellants' motion, are now a part of the record on appeal herein, contain numerous hearsay and other objectionable matters. Appellee does not question the prejudicial nature of the documents or the consideration thereof by the trial court; instead, the sum and substance of the government's argument is to the effect that a trial judge, when sitting as a trier of fact, is capable in his own mind of reviewing any amount of prejudicial and inadmissible evidence, and then completely disregard such evidence in reaching his decision as to guilt or innocence. In support of this position, Appellee cites four time honored civil actions which purportedly present situations "analogous" to the instant case. Unfortunately, the authorities relied upon are totally irrelevant to the issues herein and in fact do not stand for the proposition for which they are cited.

For example, in the case of the United States v. Graham, 46 F. 2d 639 (8th Cir. 1931), the question presented was whether the Court should default a security bond against the surety following the failure of a defendant to appear for trial. The trier of fact admitted into evidence an affidavit by the defendant for whom the

bond had been issued, which affidavit contained averments to the effect that the defendant was unaware of the trial date and had made no attempt to escape, together with other exculpatory type material. The Appellate Court held that there was no presumption that the Court gave weight to the affidavit, since "substantially all that was stated in the affidavit appeared by other evidence received without objection" (46 F. 2d at 640). The cases of Clauson v. United States, 60 F. 2d 694 (8th Cir. 1932), and United States v. Fairbanks, 89 F. 2d 949 (9th Cir. 1937), both involved actions by beneficiaries attempting to enforce war risk insurance policies. In Fairbanks certain hypothetical questions were answered by a medical expert, over objection. On appeal, however, no objection was raised by the Appellant with respect to the evidence being improperly received. The appellate court, however, in any event, considered the evidence in question to be immaterial, since the trial court in its opinion specifically stated "opinion evidence such as the higher Court has ruled out has been disregarded in this case" (89 F. 2d at page 953). Similarly, in the Clauson case it would appear that the counsel for the Appellant failed to voice timely objections to the evidence in issue therein, and accordingly, the Appellate Court held that under such circumstances it could not be presumed that the trial court did not disregard any improper evidence. The case of National Reserve Insurance Company v. Scudder, 71 F. 2d 884 (9th Cir. 1934), involved a civil action to reform a policy of fire insurance. In the case there was no showing of any evidence having been improperly admitted.

Even assuming (although there is absolutely no authority for such conclusion) that Appellee might be correct in its statement that in general an appellate court must presume that evidence of an improper nature is disregarded by trier of fact, Appellants submit that in a criminal matter such as the instant case, and particularly where one of the counts of the indictment charges a conspiracy, alleging a scheme to commit crime among the various defendants, an examination by the trier of fact of the documents in issue would clearly seem to be so prejudicial as to create bias, even though an honest attempt is made to disregard such matters. Certainly information as to the prior criminal records of both of Appellants, and lack of such record on the part of defendant Reinhardtsen, no doubt influenced the trier of fact in his convicting of Appellants, while acquitting defendant Reinhardtsen. Additionally, the conclusions of the investigating officers, which are completely hearsay, and inadmissible as evidence, are prejudicial in context, and when examined by the trier of fact would establish a relationship of guilt between the Appellants, despite the fact that there simply was no actual evidence of any conspiracy. Without doubt, the prejudice suffered by Appellants clearly outweighs any other consideration in this connection.

Insofar as the question of consideration of such statements being an absolute necessity by the trier of fact, Appellants submit that their Opening Brief adequately covers this subject, with the exception that Appellants reiterate the fact that the choice of having the trial court consider such statements is the choice of Appellants

and not the government.

See: Mims v. United States, 332 F. 2d 944 (10th Cir. 1964).

III

CONCLUSION

The record in the instant action clearly establishes that numerous errors of law were made during the course of Appellants' trial, and that Appellants were substantially prejudiced thereby. Under such circumstances, it is respectfully submitted that Appellants' respective judgments of conviction must be reversed.

Respectfully submitted,

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